

Panaji, 27th June, 1996 (Ashada 6, 1918)

SERIES II No. 13



OFFICIAL GAZETTE

GOVERNMENT OF GOA

GOVERNMENT OF GOA Department of Agriculture

Order

No. 1/21/40/Misc/95-D.Agr/150

Government is pleased to declare that one Mechanical Cultivation Office shall be established at Valpoi for providing better services to the agricultural machinery.

One post of Mechanical Cultivation Officer in the pay scale of Rs. 2000-3500, Group 'B' Gazetted presently allotted to Mechanical Cultivation Office, Tonca, Caranzalem is transferred and allotted to the newly set up M.C.O.

By order and in the name of the Governor of Goa.

S. D. Sadhale, Joint Secretary (Development).

Panaji, 14th May, 1996.

Department of Animal Husbandry

Order

No. 2/2/89-AH

Read:- Order No. 2/2/89-AH dated 5-2-96.

The ad hoc appointment of following Assistant Directors in the Directorate of Animal Husbandry & Veterinary Services, Panaji is continued for a further period of six months with effect from 1-4-1996.

1. Dr. S. B. Shet.
2. Dr. H. N. Singh.

This issues in consultation with Goa Public Service Commission vide their letter No. COM/II/11/3(1)/94 dated 8-5-1996.

By order and in the name of the Governor of Goa.

S. D. Sadhale, Joint Secretary (Development).

Panaji 14th May 1996

Department of Education, Art & Culture Collegiate Section

Order

No. 16/3/92-EDN-A

On the recommendation of the Goa Public Service Commission Panaji, conveyed vide their letter No. COM/II/6/5 (2)/94 dated 30-11-95, the Government of Goa is pleased to appoint on regular basis Shri Lawrence S. Rodrigues, Lecturer in Goa College of Architecture, Panaji to the post of Lecturer in the pay scale of Rs. 2200-75-2900-EB-100-4000-with effect from 3-6-1988.

By order and in the name of the Governor of Goa.

S. K. Jain, Joint Secretary (Education).

Panaji, 21st December, 1995.

Department of Elections

Office of Chief Electoral Officer

Notification

No. 4-3-96/ELEC

The following Notification No. 82/GOA-LA/3/95(PANAJI) dated 27th February, 1996 issued by the Election Commission of India, New Delhi is hereby published for general information.

D. N. Kamble, Asstt. Chief Electoral Officer.

Panaji, 27th March, 1996.

ELECTION COMMISSION OF INDIA

Nirvachan Sadan,
Ashoka Road,
New Delhi-110001.

Dated: 27th February, 1996
8 Phalgun, 1917 (Saka)

NOTIFICATION

No. 82/GOA-LA/3/95(Panaji).- In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951) the Election Commission hereby publishes the judgement dated 20th December,

1995 of the High Court of Judicature at Bombay, Panaji Bench, Goa in Election Petition No. 3 of 1995 filed by Shri Nicholas Pedro Fernandes challenging the election of Shri Somnath Datta Zuarkar to the Goa Legislative Assembly from 11-Taleigao Assembly Constituency.

By Order,
Archana Arora
Secretary Election Commission of India.

In the Court of Judicature at Bombay, Appellate Side,
Panaji Bench, Goa

Election Petition No. 3/1995

Nicholas Pedro Fernandes, age 37 years,
residing at Cardozvaddo, Taleigao,
Ilhas, Goa.

Petitioner

VERSUS

1. Mr. Somnath Datta Zuarkar, age 47 years,
residing at "Satyam" Shankervadi, Taleigao,
Ilhas, Goa;
2. Mr. Sanjay Moraskar, major, residing at
A 10, La Campala Colony, Miramar,
Panaji, Goa;
3. Mr. Gopalan Kanu Vazail, major, residing at
Taleigao, Ilhas, Goa;
4. Mr. Mathany Saldanha, major, residing at
St Inez, Panaji, Goa;
5. Mr. A. X. B. Viegas, the Returning
Officer, 11, Taleigao Assembly Constituency,
Goa, Office of Deputy Collector, Panaji, Goa;
6. Mr. C. V. Kavlekar, the Assistant
Returning Officer, 11 Taleigao Assembly
Constituency, Goa, Office of Mamlatdar,
Panaji, Goa;

Respondents

Shri U. R. Timble and Shri K. L. Bhagat, Advocates, for the
petitioner.

Shri V. B. Nadkarni, Sr. Advocate, with Shri A. N. S. Nadkarni,
Advocate, for the respondent No. 1.

Shri G. U. Bhobe, Government Advocate, for the respondents Nos.
5 and 6.

Coram: T. K. Chandrashekara Das, J.

Dated: 20th December, 1995.

Judgement

The petitioner was one of the defeated candidates who contested for the Legislative Assembly Election in 11-Taleigao Assembly Constituency of State of Goa, which was held in November, 1994. He challenges the election of the 1st respondent from that Constituency

by seeking a relief of re-counting. The respondents Nos. 2 to 4 are the other candidates who contested from that Constituency. The respondent No. 5 was the Returning Officer of the Constituency and the respondent No. 6 was the Assistant Returning Officer. The petitioner contested the election under the banner of Maharashtraadi Gomantak Party whose election symbol was Lion whereas the respondent No. 1 contested as a candidate for Congress-I Party whose election symbol was Hand. The respondent No. 1 polled 6514 votes whereas the petitioner polled 6442 votes. The respondent No. 1 was thus declared elected by a margin of 72 votes. There were altogether 251 invalid votes. Among the other candidates, the respondent No. 2 polled 163 votes, the respondent No. 3 polled 43 votes and the respondent No. 4 polled 363 votes.

2. In all 251 votes were declared invalid. The petitioner alleged a large scale of malpractices and irregularities committed by respondent Nos. 5 and 6 and their Counting Supervisors while counting the votes. The petitioner also alleges that the respondent Nos. 5 and 6 were biased and they were the active supporters of respondent No. 1; that some of the Counting Supervisors were campaigning for the 1st respondent visiting house to house and on this ground many of the objections raised by the petitioner at the time of counting have been discarded, resulting in many votes polled in favour of the petitioner being wrongly rejected and that many of the invalid votes polled in favour of the 1st respondent have been accepted which ought to have been rejected.

3. The 1st respondent, while denying all the allegations in his Written Statement, contended that the petition is liable to be rejected for non-compliance of Section 81(3) and Section 83 (1) (b) of the Representation of the People Act, 1951 and that pleadings do not disclose any cause of action for lacking material facts and therefore prayed for the dismissal of the petition. The respondents Nos. 2 to 4 were absent and hence they were set ex parte. The respondents Nos. 5 and 6 were represented through Government Advocate and they have filed separate Application No. 1 of 1995 praying that their names struck off from the party array.

4. On the basis of the aforesaid pleadings, the following issues were framed:

1. Whether the respondent No. 1 proves that the petition is liable to be rejected in limine:

- i) for non-compliance with Section 81(3) and 83(1) (a) (b) and proviso thereunder of the Representation of Peoples Act;
- ii) for want of due verification of the petition in accordance with law;
- iii) for lack of material facts and details of ballot papers with their numbers.

2. In view of (iii) of issue No. (1) above whether the pleadings in relation thereto are liable to be struck off or ignored?

3. Whether the petition is filed within the period as provided for under the Representation of Peoples Act and if not what orders?

4. Whether the respondents prove that the election petition is liable to be rejected in limine under O. 7, R. 11, of C. P. C., 1908, for non-disclosure of cause of action?

5. Whether the petitioner proves that the conduct of Election Rules were violated as alleged?

6. Whether the petitioner proves that he is entitled for an order of the recount of votes polled or any part thereof on the grounds of improper rejection of valid votes and /or improper reception of votes as alleged and for non-compliance with various provisions of the Representation of Peoples Act, Rules and directions/instructions, with the result the election is materially affected on both counts?

7. Whether the petitioner proves that the result of the election has been materially affected as alleged?

8. Whether the petitioner proves that he is entitled for a declaration that petitioner is elected to the 11-Taleigao Assembly Constituency as prayed for?

5. At the instance of the parties, issues Nos. 1 to 4 were taken of the for hearing as preliminary issues. Issue No. 1 relates to the non-compliance of Sections 81(3) and 83(1)(b). As far as non-compliance of Section 81(3) is concerned, the counsel for the 1st respondent submits that the copy received by him does not contain the attestation by the petitioner under his own signature to be a true copy of the petition. He submits that the front page of the paper-book contains cause-title and index and page No. 1 starts with the cause-title and ends in page No. 129 which is a list of witnesses furnished by the petitioner. On the front page, the top of the index as aforesaid contains a certificate signed by the petitioner to be the "true copy of the petition along with the annexures". The last page of the paper-book which is the list of witnesses also contains similar certificate and signature of the petitioner. This page also contains another affirmation and verification certifying that "this is the true copy of the witnesses list attached to the election petition" and the petitioner has signed under this verification. The learned Senior Counsel Mr. Nadkarni appearing for the 1st respondent submits that this certificate and signature contained on the first page and the last page of the paper-book will not be sufficient to satisfy the requirement of the latter part of Section 81(3) of the Representation of the People Act, 1951. He relied on the various decisions of the Supreme Court in support of his contention, some of which are *M. Kamalam v. Dr. V. Syed Mohammed* (AIR 1978 SC 840), *Rajendra Singh v. Usha Rani and others* (AIR 1984 SC 956) and *F. A. Sapá Etc. Etc. v. Singora and others* (AIR 1991 and SC 1557). He emphatically argued that the Representation of the People Act visualizes the 'election petition' and 'other annexures' separately. Therefore unless the copy of the election petition proper does contain a signature certifying it to be the true copy of the election petition, the certificate and signature contained in any other part, namely, on annexures, witness list or on the index cannot be treated as the mandatory provisions of Section 81(3) of the Representation of the People Act being fulfilled. He was trying to distinguish the rider laid down by the Supreme Court in *M. Kamalam's* case (*supra*) where the copy of the affidavit containing the signature and attestation of the petitioner were treated by the Supreme Court as part of the petition, as the said petition was based on allegations of corrupt practices. Only in such petitions based on corrupt practice, the annexures and other documents could be treated as part of the election petition in which the Supreme Court treated that signature of the petitioner on the affidavit as sufficient compliance of latter part of Section 81(3) of the Act.

6. I cannot agree with this contention of the learned counsel for the respondent No. 1. The election petition cannot be separated from the index, synopsis and other annexures and the witness list etc. filed along with the petition proper. It may be that an election petition for recounting cannot be declared as defective if it is not accompanied by an annexure or witness list etc., but once an election petition is filed along with annexures, affidavits, witness list etc. in the manner provided under the Rules of the High Court prescribed for filing of a petition, it cannot be said that such index, synopsis, annexures and witness list cannot form Part of the election Petition. If the paper-book

contains the index synopsis, annexures, election petition and the witness list and if any of the pages of the paper-book contains a signature of the petitioner certifying that it is the true copy of the 'petition and the annexures' etc. than it can be treated as a substantial compliance of latter part of Section 81(3) of the Representation of the People Act. *Ch. Subbarao v. Member, Election Tribunal, Hyderabad and others* (AIR 1964 SC 1027), *M. Kamalam v. Dr. V. A. Syed Mohammed* (AIR 1978 SC 840), *Rajendra Singh v. Smt. Usha Rani & ors.* (AIR 1984 SC 956), *F. A. Sapá Etc. Etc. v. Singora and others etc.* (AIR 1991 SC 1557) and *Sarder Mal v. Smt. Gayatri Devi* (AIR 1964 Raj. 223) deal with this aspect of the matter in extenso. Considering the aforesaid decisions in greater detail, this Court held in another election petition as Election Petition No. 2 of 1995 that a similar certificate of the petitioner certifying that this is the 'true copy of the petition along with annexures' and bearing signature in any part of the paper-book will suffice for complying with the mandatory requirement of Section 81(3) of the Act. In Para 10 of that judgment, this Court held:

"In view of the pronouncements of the Supreme Court discussed in the above decisions, I perfectly agree with the view taken by the learned Judge of the Rajasthan High Court. No particular form manner or place was prescribed or restricted for attesting the copy of the petition by the petitioner. Only thing is that it should be made amply clear on perusal of the copy of the Election Petition that it contains a signature of the petitioner and attestation by him to be true copy of the petition. If this is contained in the paper-book containing the Election Petition, it can be said that the latter part of Section 81(3) has been substantially complied with."

Exactly similar situation arose in this Election Petition also. In view of the above observations, I cannot take a different view in this petition also. Therefore, I hold that the latter part of Section 81(3) of the Representation of the People Act has been substantially complied with by the petitioner.

7. But my endeavour on this aspect does not end here. During the hearing of the petition it has been revealed another important defect. When the Election Petition was filed before this Court, the office has prepared an Examination form which contains 17 Questions and Answers touching the regularity of the filing of the petition. Most of the queries have been answered affirmatively by the Office. But in Question No. 9, a defect was noted. For clarity I shall reproduce the question and answer:-

"Question No. 9: Whether the petition including copies is neatly typewritten with legibility, sufficiency of spaces between lines, on a strong and foolscap paper, with necessary margin?"

Answer Exh. at pg. 119 is not clearly legible."

This defect was brought to the notice of the counsel for the petitioner and he has undertaken to clear off that objection by Monday the 30th January, 1995. Accordingly, Exhibit 'A' at page 119 which is a xerox copy of the petition filed by the petitioner before the Returning Officer requesting for re-count and also Order passed by the Returning Officer on 9-12-1994 on such a request. A neatly typed copy of Exhibit 'A' is filed by the petitioner with an attestation by the petitioner that 'this is true copy of Exhibit 'A' as can be seen in between Exhibit 'A' and page 121- list of documents. Therefore, it is to be taken that by producing a neatly typed copy of Exhibit 'A' before the Court, the defect pointed out by the Office has been cured. But strangely, this neatly typed copy of Exhibit 'A' has not been incorporated in the paper-book served on the respondents. The learned counsel for the 1st respondent showed me the copy of the paper-book served on the 1st respondent. The neatly typed copy of Exhibit 'A' as found in the original copy of the Election Petition filed in the Court does not find a place in the copy of the Election Petition served on the 1st respondent.

8. The learned counsel for the 1st respondent submits that the non-furnishing of the neatly typed copy of Exhibit 'A' which was produced in original copy in pursuance of the defect noted by the Office is clear violation of the former part of Section 81(3) of the Representation of the People Act. It cannot be said that "every election petition shall be accompanied by as many copies as there are respondents mentioned in the petition", and in view of this defect, the learned counsel submits that it cannot be said that the petitioner has filed a legible copy of the election petition as mandated in the first part of Section 81(3) of the Act. He submits that the respondent is entitled to get a legible true copy of the election petition. 'A copy of the election petition' means 'a legible copy of the election petition'. Moreover all materials contained in the original petition filed before the High Court are lacking in the copy of the petition served on the 1st respondent. Therefore, he submits that the election petition is liable to be rejected for the non-compliance of earlier part of Section 81(3), assuming that the latter part of Section 81(3) has been substantially complied with as held by this Court.

9. The learned counsel for the petitioner, on the other hand, argues that non-furnishing a legible copy of Exhibit 'A' is not fatal to the petition. According to the petitioner, Exhibit 'A' itself was legible, but another typed copy of Exhibit 'A' was produced just to get over the defect pointed by the Registry of this Court. Therefore, petitioner is not required to serve a typed copy of Exhibit 'A' on the respondents as the contents of Exhibit 'A' and its typed copy are one and the same. Therefore, it cannot be said that former part of Section 81(3) of the Act was not complied with. He further submitted that this objection cannot be taken at the belated stage of hearing and it should have been raised in the Written Statement. He has cited a decision of *Mahendra Kumar v. Bheem Raj Meena* reported in 1995 A. I. H. C. 1444 (Rajasthan High Court) in support of his contentions. I cannot accept the contention of the petitioner in the context of rigour of the rule postulated in Section 81(3). When Registry points out in the petition (Original copy) a defect and it has been cured, it is the duty of the petitioner to cure that defect, if it does exist in the copy of the respondent intended to be served on the respondents also. If such defect continues to be allowed to exist in the copy, it cannot be said the petitioner has served a true copy of the Election Petition on the respondents. The decision noted above is not at all applicable in this case. In that case noting was discovered during the hearing of the case. In that case defect was already there and the respondent had not raised any objection at that time; but only prayed for the filling written statement. But in the present case the defect was noticed by the 1st respondent first time only at the time of hearing. He had no occasion earlier to discover the defect. He discovered it casually at the time of arguments. As it is a question of law, there was nothing wrong to raise even at the stage of hearing across the bar. I find, therefore, that there is a non-compliance of Section 81(3) of the Representation of the People Act and the Election Petition is liable to be dismissed.

10. Now I come to the second limb of the arguments of the counsel or the 1st respondent, referring to the insufficiency of pleadings. Though I find the petition is liable to be dismissed under Section 86(1) as shown above, since much time has been consumed and several decisions were discussed across the bar, I think it proper to address his question also. The learned counsel for the 1st respondent submits that material facts constituting cause of action have not been stated in the Election Petition. It contains only bald and ambiguous statements lacking clarity and precision. Before embarking upon this question, let us examine the allegations contained in the Election Petition. The allegations in the Election Petition could be grouped into (a) and (b).

11. Group (A): That the Counting Staff and the respondents Nos. 5 and 6 are biased and supporting the 1st respondent. In Para 7 of the Election Petition it has been alleged that the respondents Nos. 5 and the Returning Officer and the Assistant Returning Officer, respectively,

followed the procedure of counting contrary and in utter disregard to the directions and instructions issued by the Election Commissioner. He alleges that the respondents Nos. 5 and 6 are the voters of the Constituencies and the Returning Officer, respondent No. 5, had appointed various Counting Assistants so as to assist him in the counting. Amongst various Counting Supervisors appointed by the respondent No. 5, Mr. M. R. Khalwadekar, Mrs. Carmina Fernandes and Mr. Shahid Shantaram Keshkamat who are voters of those Constituencies were included as Counting Supervisors. Moreover, Mrs. Pascoal Godinho alias Mrs. Pascoal Miguel Mascarenhas and Mr. Omku Kunkolienkar were active supporters of the 1st respondent. It is further alleged that two of the petitioner's workers, Arun Sirodkar and Angelo Silveira, had personally seen Mr. M. R. Khalwadekar and Mrs. Pascoal Godinho campaigning for the 1st respondent. He further alleges that the respondents Nos. 5 and 6 were also said to be canvassing for respondent No. 5, indirectly. These allegations are enumerated in paras 9(A), 10(A), and 10(B). The learned counsel for 1st respondent contends that though these allegations were made against the Officers including respondents Nos. 5 and 6, the details of the houses in which these officers visited for campaigning in favour of the 1st respondent, what are the house numbers, on what dates the campaigning was done, are not alleged in the Election Petition. Moreover, it is alleged in the Election Petition that the respondents Nos. 5 and 6 are *indirectly* canvassing for the 1st respondent.

12. Learned counsel for 1st respondent points out another important aspect. These Officers are, admittedly, Government Officers. When it came to the notice of the petitioner that in violation of the Conduct Rules, they were indulging in campaigning and canvassing votes in favour of candidates for political parties, no complaint, written or oral, were stated to have been made either to the Superior Officers of these employees or to the State Electoral Officer or to Election Commission. Even averments are not there in the petition that they have made such complaints, much less, any contemporaneous evidence that effect. Therefore, the bias and partiality alleged on the part of the respondents Nos. 5 and 6 and Counting Supervisors has not been precisely and clearly pleaded in the Petition. Another allegation which can be considered in this context is that the original timing of counting fixed was from 8.00 a. m. to 4.15 p.m. and this timing has been changed by respondent No. 5 without prior notice to the Petitioner or to his Election Agent, Shri Ramesh Silimkhan and, therefore, Rule 51 of the Conduct of Election Rules has been violated by the respondent No. 5. However, this pleading also is not relevant for the purpose of the case because neither the petitioner made any complaint before the Returning Officer regarding the change of timing without notice, nor there is any incident that in any of the counting tables, the petitioner could not deploy his counting agents and thereby the counting was affected. The violation of the instructions issued by the Election Commissioner to the Presiding Officer will not vitiate the counting unless it is alleged that it has been materially and adversely effected the polling or counting.

13. Counsel for respondent No. 1 cited another interesting part of the allegations as extracted herein below. It is stated at paragraph 8 (C):

"The petitioner states that as stated hereinabove, the counting of the Panaji Assembly Constituency started from 8 a. m. at the said counting hall. The counting staff which counted the votes of Panaji Assembly Constituency remained the same for the said Constituency with the result even the counting staff working under the Returning Officer was tired and exhausted. The Petitioner states that due to the aforesaid factors, there were lots of mistakes committed by the counting staff working under the Returning Officer, as well as, by the counting agents of the Petitioner. The Petitioner states that many of the counting assistants and supervisors were in fact grumbling and complaining all the time during the counting process about the load of work and the delay."

No doubt that this allegation is not at all relevant to the Petition. If at all any grievance of tiredness of the Counting Officers is concerned, it applies to the entire process of counting and the petitioner alone cannot make out a grievance. Any inefficiency or inaccuracy in the counting, which might, alleged by the petitioner, happen, it will affect throughout the counting of the ballot papers.

14. Now I come to the next group of allegations, Group (B). This group mainly deals with the alleged malpractices adopted by respondents Nos. 5 and 6 in counting. The malpractices alleged in the petition are that valid votes of the petitioner were deliberately put in pigeon box of respondent No. 1; that valid votes of the petitioners were declared deliberately invalid and doubtful votes were treated as valid and decided in favour of the respondent No. 1; doubtful votes when referred to the Returning Officer did not allow the petitioner's agents to get a close look of the ballot papers; that counting was done so fast that agents could not properly see the ballot papers; sorting and counting was done simultaneously and because of this, petitioner's agents could not actually verify each ballot papers. Seventeen votes cast in favour of the petitioner were found in pigeon box of respondent No. 1; that two votes cast in favour of respondent No. 2 were found in pigeon box of respondent No. 1. In table No. 14, about six votes of petitioner and two votes of respondent No. 2 were put in pigeon box of respondent No. 1; that there was a defect in bundling of votes in 25 lots, that they were folded in such a way that symbols could not be seen outside; that there was frequent electricity failure and lack of sufficient light in the counting hall; that the 1st respondent was ex-Minister and yields lot of influence. Further allegations are that 92 doubtful votes should have been counted in favour of the petitioner, but they were rejected on the ground that 3/4 portions of stamp is not overlapping on the petitioner's symbol; that 27 votes were rejected on the ground of double stamping when actually there was no double stamping; that the decision of the doubtful votes was taken by respondents Nos. 5 and 6 so speedily and in a hasty manner that the agent of the petitioner could not take down the details, that the raised platform for the sitting of the Returning Officer has not been provided as contained in the instructions issued to the Returning Officers; are the main allegations contained in this Group.

15. I have only stated the gist of the allegations here. The learned counsel for the 1st respondent has submitted that except for wild and bald allegations, material facts required to be stated in an election petition for re-count was lacking. These allegations do not constitute a cause of action though the petitioner has extensively described the irregularities committed in the counting in paragraph 11 (a) to 11 (o). The learned counsel for the 1st respondent has argued that none of the instances pointed at paras 11 (a) to 11 (o) constitute a cause of action for establishing a case for a re-count. All these pleadings are whimsical and bald lacking precision and accuracy. To substantiate his arguments, he has taken me in detail through all the allegations contained in paras 11(a) to 11(o). It is relevant to note here some of the paragraphs of the pleadings. In para 11(c) it is stated:-

"The Petitioner submits that he as well as his several counting agents namely Dominic Fernandes, Francis Estrocio, Ranganath Veluskar, Arun Shirodkar, Apolino Viegas, Kali Divkar, Diogo Rodrigues, Sharad Palekar, Agnelo Fernandes, Diogo Barbosa, lodged oral protests with the counting supervisors on the respective tables being table Nos. 10, 4, 12, 14, 15, 3, 9, 11, 6, 7, as also with the Returning Officer that the entire counting process was being carried on in a hurried and a most confusing manner and was likely to lead to several errors. Therefore the same be slowed down and taken up in a more systematic and orderly manner. However, the counting agents were bluntly told that they were supposed to be mere spectators and they were not entitled to in any manner give any suggestions or request for any changes in the counting process. The Petitioner states that the Petitioner also protested against the manner in which the counting was being conducted giving rise to confusions and doubts

and requested the Respondent No. 5 to slow down the process and further that the sorting of votes be completed first and the counting and tying of votes in bundles be done only after the sorting was completed. However, the respondent No. 5 did not pay any heed to this request of the Petitioner and told Petitioner that the same manner was followed in countings in respect of all other Constituencies and sorting and counting was always being done simultaneously."

Mr. Nadkarni pointed out that no material allegations are contained in this Petition. Moreover the said paragraph shows that whatever errors might have been committed were rectified properly and promptly.

16. Paragraph 11(c):

"The Petitioner submits that the worst course followed was that after each bundle purportedly containing twentyfive votes was made, the counting agent folded the votes in the bundle in such manner that the symbol was folded on the inner side and could not be seen from outside. A rubber band was put around each bundle and then the bundle was again placed in the pigeon box assigned to that particulars candidate. While these bundles were being placed in the pigeon box since the symbol could not be seen from outside there was *every likelihood* of any bundle being erroneously or intentionally placed in the wrong pigeon box. This *Possibility* was also pointed out to the counting supervisors as also to the Returning Officer and they were requested to at least recheck the bundle before being placed in a particular compartment to confirm that there is no error committed or manipulation done. However, this request also met deaf ears." (underline supplied).

Paragraph 11(k):

"The Petitioner states that the First Respondent was all along sitting next to the Distribution Officer, Mr. V. J. Bandodkar, the Distribution Officer prepared a report by noting down the tally of votes of each table. The 1st Respondent was seen talking with the said Distribution Officer and the counting supervisor when the report was being prepared. The counting supervisors on table Nos. 6, 7, 9, 10, 11, 12, and 13 were also filling in the tally forms in respect of their respective tables before the Distribution Officer from their notings made on plain papers. The petitioner who was sitting next to the respondent No. 5 became suspicious about the said process being carried on the table of the Distribution Officer and requested the Respondent No. 5, that he should be allowed to sit next to the Distribution Officer. However, the Returning Officer, turned down the request of the Petitioner. The petitioner, therefore, apprehends that in fact the Distribution Officer might have wrongly taken down the tally of votes secured by the Petitioner, as well as the other candidates or that the said Counting supervisors might have filled the tally forms wrongly thereby benefitting the Petitioner."

Paragraph 11(m):

"The Petitioner states that the Returning Officer did not also allow the petitioner or his agent to take a detailed inspection of the doubtful votes. The Petitioner states that 92 votes cast in favour of the Petitioner were stamped near the blankspace but partially or more than half the marking was in the area of the symbol of the Petitioner. The Petitioner and his agent Mr. Ramesh Silimkhan insisted that the said votes were to be counted in favour of the Petitioner. However, the Returning Officer rejected the same saying that the stamp ought to have been three fourths within the area of the Petitioner's symbol. He also stated that his agent were not entitled to argue or raise any dispute thereon. The Petitioner states that the said entire votes were rejected by the returning officer without even giving detailed reasons for their rejection. Out of the doubtful votes allowed to be counted in favour of the Petitioner, 21 votes which were allowed to be counted

in favour of the Respondent No. 1 of the petitioner were in fact stamped on two symbols viz. hand and the bicycle and the same ought to have been rejected as invalid votes. However, the same were illegally and improperly allowed to be counted as valid votes in favour of the 1st Respondent. The Returning Officer while allowing the counting of said votes in favour of the 1st Respondent told the Petitioner and his agent that the second stamp/marking on the symbol "Bicycle" was not a stamp/markings but only an impression carried due to wrong folding. However, the Petitioner or his agent was not allowed to take even a close look at the same. On the contrary, 27 votes which were of the similar type in favour of the Petitioner wherein in fact clearly there was no double stamping/markings but only an impression had appeared on the other symbol due to wrong folding were rejected by Respondent No. 5 insisting that the same were marked on two symbols and the Petitioner or his agent were not allowed to have close look at the same."

These paragraphs are quoted by Mr. Nadkarni to show how ambiguous the pleadings are. Not a single material fact, relevant to the cause of action or material to the case of the Petitioner, has been alleged by the petitioner. The allegations are such that any lost candidate could make on an after thought. For example, counsel pointed out the vagueness of the allegations in para 11(m) quoted above. He was alleging about 92 votes cast in favour of the Petitioner. At the same time he says that the stamps on those ballot papers are on the blank places. The learned counsel points out how these pleadings go hand in hand. In one breath he says that 92 votes were cast for him and in another breath he says that stamps on ballot papers were near blank spaces. He fails to note the number of ballot papers, the number of Polling Stations etc. On reading the pleadings in its entirety, I find force in the arguments of Mr. Nadkarni. None of the allegations contained in the petition give a definite or clear allegation which constitutes a cause of action for the re-counting.

17. Moreover, another aspect is to be taken into account. Even though in the Election Petition several allegations are contained, the request made by the petitioner before the Returning Officer as soon as the counting was over is very cryptic. The explanation contained in the petition for this is that there was no sufficient time to detail all these allegations. But insufficiency of time was also not mentioned in the application filed by the petitioner before the Returning Officer that he was compelled to make a cryptic application because of shortage of time. The learned council for the 1st respondent argues, assuming for argument sake, that there was shortage of time to give details in the application, it cannot be comprehended as to how the petitioner failed to furnish the figures contained in this petition to the Returning Officer when he made this application Exhibit 'A' for re-count. He did not give any details of the ballot papers. He did not give any details of the polling stations. Even table number were not given.

18. The learned council for the petitioner submits that it may be that there are some omissions to mention some particulars or the pleadings may be lacking on some points, but that will not render the Election Petition to be dismissed at the threshold. If some materials are there to constitute a cause of action, this Court is not justified in dismissing the Election Petition as it does not contain any material facts constituting cause of action.

19. The learned council for the 1st respondent, Mr. Nadkarni, pointed out that the inadequacy of the pleadings that it did not make out a case for re-counting is a sufficient ground to reject the petition in view of the various decisions of the Supreme Court. He drew my attention in this context to a decision of the Supreme Court in *Chanda Singh v. Ch. Shiv Ram Varma and others* (AIR 1975 SC 403). The said decision points out the requirements of the definiteness and certainty of the pleadings for a re-count. The Supreme Court has observed in that judgment that suspicions of possible mischief in the process or likely errors in counting always linger in the mind of the defeated candidate when he is shocked

by an unexpected result. The Returning Officer has to be careful, objective and sensitive in assessing the legitimacy of the plea for re-running the course of counting.

20. The aforesaid decision throws ample light on the mental process of a defeated candidate while he supplies some materials later in the election petitions which were not provided in the contemporaneous request made by him to the Returning Officer for re-count. In para 5 of that judgement, the Supreme Court has observed thus:

"5. Let us now proceed to see what further materials have been furnished in the election petition to induce the Court to reopen the ballot boxes and order a recount, assuming that in some honest instances genuine information of mistakes and malpractices may be gained days later. The passage of time often embellishes ideas and imports inspiration and the petitioner, by April 26, was equal to the expensive precision of a well-grounded demand for recount according to the legal canons settled by this Court. What was a mere bud of suspicion flowered into several figures of malpractice and it was alleged with surprising accuracy that 1200 votes polled in favour of the petitioner were illegally declared invalid by the Returning Officer. Allegations in similar arithmetical strain followed in paragraphs 5, 6 and 7, of the election petition.....Without hesitation one might say this too perfect case for a recount was a clever afterthought, if only one looks at Exhibit P.W. 4/1 for a refreshing contrast."

The Supreme Court has very candidly stated in the above passage that a case which has not been put forward before the Returning Officer for re-count has to be looked into suspiciously when new facts and figures have been brought in the allegations in the election petition.

21. The learned council for the 1st respondent brought to my notice another decision of the Supreme Court in *Jitendra Bahadur Singh v. Krishna Behari and others* (AIR 1970 SC 276). In that decision the Supreme Court has held that the basic requirements to be satisfied before an election tribunal can permit the inspection of ballot papers, are (1) that the petitions for setting aside the election must contain an adequate statement of the material facts on which the petitioner relies in support of his case and (2) the tribunal must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. The material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words they must be of such facts as to afford a basis for the allegations made in the petition. In the aforesaid decision, the Supreme Court has clearly stated thus:

"....If an election petitioner in his election petition gives some figures as to the rejection of valid votes and acceptance of invalid votes, the same must not be considered as an adequate statement of material facts when the petitioner has not disclosed in the petition the basis on which he arrived at those Figures."

22. The learned council for the respondent No. 1, also drew my attention to yet another decision of the Supreme Court in *Shri Satyamaran Dhadhani v. Uday Kumar Singh and others* (AIR 1993 SC 367). In that case, an allegation similar to the present one had been made in the election petition and the Supreme Court has commented in para 4 of the judgement in the following terms:

"4. It was pleaded in the election petition that 339 valid ballot papers in favour of the petitioner were neither counted nor rejected

by the Counting Supervisor. 35 valid votes in favour of the petitioner were not counted in his favour on the false plea that the ballot papers were missing. It was also claimed in the petition that irregularities committed in the fifth round of counting at table No. 8 in respect of booth No. 64 materially affecting the result of the election. 30 votes were counted less in booth No. 3 by the Counting Supervisor. Similar allegations in respect of counting were alleged in the election petition."

The Supreme Court held in para 10:

"10. It is thus obvious that neither during the counting nor on the completion of the Counting there was any valid ground available for the recount of the ballot papers. A cryptic application claiming recount was made by the petitioner-respondent before the Returning Officer. No details of any kind were given in the said application. Not even a single instance showing any irregularity or illegality in the counting was brought to the notice of the Returning Officer. We are of the view when there was no contemporaneous evidence to show any irregularity or illegality in the counting, ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition. We have been taken through the pleadings in the election petition. We are satisfied that the grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. It is settled proposition of law that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course."

23. The learned council for the respondent No. 1 has also brought to my notice a decision of Allahabad High Court in *Shyam Lal Rawat v. Ram Lal and others* (AIR 1987 A.I 32) and *Narain Chand Prashar v. Prem Kumar Dhumal and others* (AIR 1933 H.P. 84) wherein it was held in those decisions that in the absence of precise pleading as to the irregularities in the proceeding the petitions is liable to be dismissed. In Himachal Pradesh case cited above, it has been held thus:

"...In order to find out the genuineness of the grievance, it is only when the ballot paper numbers are given with respect to those ballot papers with respect to which there is any grievance that the same can be scrutinised. Absence of such an information, which the petitioner alone should have known or should be deemed to know, any inspection of the ballot paper would be merely a roving and fishing inquiry, which precisely is prohibited under Section 83 (1)(a) of the Act."

24. The learned council for the 1st respondent, therefore, submitted that this Court cannot interfere and order re-count unless the petitioner in precise details gives the informations regarding the irregularities and illegalities alleged to have been committed by the Counting Officers. Unless these particular are furnished and pleaded, the Election Petition is liable to be dismissed at the threshold.

25. In reply to this argument, the learned council for the petitioner, Shri Timble, submits that all the decisions quoted above on behalf of the respondent No. 1 are the decisions which were rendered after the evidence was allowed to be adduced. The counsel, therefore, submits that the only question to be decided at this stage is as to whether the petitioner has made out a triable case avoiding a dismissal of the petition at threshold. He submits that Section 86 of the Representation of the People Act alone gives the power to the Court to summarily reject an election petition for the defects pointed out in Section 81 (3) of the Act.

The aforesaid Section does not give the power to the Court to summarily reject an election petition on some other grounds. Another provision that gives such a power to Court to reject a petition summarily is order VII, rule 11 of Civil Procedure Code. In other words, he contended that if the election petition is found to be in order under Section 81 in all its respects, the provisions of Civil Procedure Code alone will be applicable for further course of action pertaining to an election petition. If cause of action is shown to have arisen in favour of the petitioner on the basis of the allegations contained in the petition, this court will not be justified in rejecting the petition summarily. He submits that though so many specific details are lacking in the pleadings, the petitioner has made out some cause of action which enables the Court to take the case for trial. In order to fortify his argument, he cited a Supreme Court decision in *Jagjit Singh v. Dharam Pal Singh and others* [1995 Supp. (1) S.C. Cases 422]. He heavily relied on the observations made by the Supreme Court in para 10 of the judgement which is extracted below:-

"10. It would thus appear that in the aforementioned paragraphs of the election petition the appellant had set out the number of votes which were improperly rejected, the particular booth to which they related, the particular table at which the said votes were counted and the grounds on which the votes were rejected. All that was lacking was the serial numbers of the rejected ballot papers. Explanation for the same is offered in paragraph 12 of the election petition, whereinafter, referring to the requirement laid down in Rule 56(3) of the Conduct of Election Rules, 1961, it is stated that in view of the seating arrangement at no stage any ballot paper was shown to the agents of the candidates or to the candidates at any stage during the counting. The truth his falsity of this explanation will have to be decided on the basis of evidence that is adduced at the trial. But at this stage the said explanation cannot be ignored."

He also relied upon a decision in *Arun Kumar Bose v. Mohd. Furkan Ansari and others* [(1984) 1 S.C. Cases 91].

26. On a careful scrutiny of the facts of the above cases, I am of the view that petitioner cannot rely on those decisions. Paragraphs 8 and 9 of the judgement in *Jagjit Singh's* case (supra) made it clear all the relevant materials, details of the ballot boxes, polling booth numbers and the number of rejected votes in that case, table numbers, objections raised with respect to counting Agents and Counting Officers which made impossible for the Counting Agent to note the numbers of the ballot papers etc. etc. and the Supreme Court has found on facts that all the details necessary for the counting have been furnished by the appellant in that case. According to me, no such details have been furnished in this petition. The counsel for the petitioner also argued that the petitioner need only to establish a *prima facie* case in the pleadings and that a weak case will not justify the petition to be dismissed at the threshold. He cited the decision of *Mohan Rawale v. Damodar Tatyaba alias Dadasaheb and others* [(1994) 2 S.C. Cases 392]. According to me, all these arguments will not hold good as pointed out by the counsel for the respondent No. 1 that the allegations contained in the petition for re-count are not adequate and lacking in many details and particulars necessary for constituting a cause of action.

27. The cardinal principle to bear in mind in dealing with an election petition for re-count has been laid down by the Supreme Court as early as 1966 in *Jagjit Singh v. Kartar Singh* (AIR 1966 SC 773). The

observations of the Supreme Court in that case are very significant. The words of caution contained in that judgement are an important guidance to the High Court when it deals with a Petition for re-count. In para 31, the Supreme Court observes thus:

"...Therefore, in a proper case, the tribunal can order the inspection of the ballot boxes and may proceed to examine the objections raised by the parties in relation to the improper acceptance or rejection of the voting papers. But in exercising this power, the Tribunal has to bear in mind certain important considerations. Section 83(1)(a) of the Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies; and in every case, where a prayer is made by a petitioner for the inspection of the ballot boxes, the Tribunal must enquire whether the application made by the petitioner in that behalf contains a concise statement of the material facts on which he relies. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted, would not serve the purpose which S. 83(1)(a) has in mind. An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or not. In dealing with this question, the importance of the secrecy of the ballot papers cannot be ignored, and it is always to be borne in mind that the statutory rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases, the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered by voters at any given election; but in considering the requirements of justice, care must be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void. We do not propose to lay down any hard and fast rule in this matter; indeed, to attempt to lay down such a rule would be inexpedient and unreasonable."

After discussing the procedure to be followed for counting and recounting under Rules 56 and 63 of the Conduct of Election Rules, in Para 32 of the judgement, the Supreme Court observed thus:-

"....After all this procedure has been gone through, the Returning Officer completes the result sheet in form 20, and signs it. Once that is done, no application for a re-count shall be entertained. We have referred broadly to the scheme of these Rules to emphasise the point that the election petitioner who is a defeated candidate, has ample opportunity to examine the voting papers before they are counted, and in case the objections raised by him or his election agent have been improperly overruled, he knows precisely the nature of the objections raised by him and the voting papers to which those objections related. It is in the light of this background that S. 83(1) of the Act has to be applied to the petitions made for inspection of ballot boxes. Such an application must contain a concise statement of the material facts."

In para 33 of the said judgement the Supreme Court concludes thus:-

"33. This question has been considered by this Court on several occasions. In *Ram Sewak v. Hussain Kamil*, AIR 1964 SC 1249, this

Court observed that an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection. The same view has been expressed in *Smt. Dr. Sushila Balraj v. Shri Ardhendu Bhushal*, (1964) C.A. No. 222 of 1964, D/-18-3-1964 (SC), and in *Sitaram Mahto v. Ramanandan Raj.* (1965) C. A. No. 45 of 1965, D/- 10-2-1965."

28. It is, therefore, settled position of law keeping in mind the above cardinal principle, that if one look sat the allegations made in this petition, it cannot be said that the petitioner has satisfactorily placed the relevant materials constituting cause of action for a triable case. The argument of the learned counsel that the Court at this stage can only look into the allegations for the purpose of a *prima facie* satisfaction of the Court whether the petitioner has made out a case, cannot be accepted. The materials required to be furnished in the pleadings for re-count are such that, if the allegations contained in the election petition as such were not controverted, will those allegations or materials supplied therein be sufficient to identify the ballot papers which were subject of irregularity and illegality and order of re-count? In this case, of course, the petitioner has furnished certain number of ballot papers wrongly rejected as invalid. The explanation given in the Election Petition for not furnishing further particulars in the application for re-count filed before the Returning Officer cannot be believed. At the same time, in *Jagjit Singh v. Dharam Pal Singh and others* [1995 Supp (1) S. C. C. 422], a decision relied on by the counsel for the petitioner was a case where all the material particulars have been furnished without making any room for doubts in the minds of the parties. Paras 8 and 9 of that judgement will make it amply clear. The omission to supply the numbers of ballot papers has also been explained in the petition. Here, the case in hand, the only explanation given for not furnishing the required numbers of ballot papers, polling station numbers and other particulars is that the counting has been done so fast. Fast counting set up as a defence for not mentioning the details of the ballot papers is not at all germane. Even about the votes mentioned in para 10 (m), the petitioner fails to give necessary details. Petitioner stated in that para, 92 votes stamped near blank places but partially on the petitioner's symbol, the Returning Officer rejected the votes. Not only that, he did not give number of those ballot papers, but did not even give number of polling station. Without some more details how these votes could be identified. So also about 21 votes wrongly accounted in favour of respondent No. 1 as stated in the said para, the petitioner could not mention the numbers of these votes. So also particulars are lacking about another 27 votes mentioned in that para. One cannot comprehend that if the petitioner can give the number of votes in such accuracy, what fails him to furnish numbers of ballot papers and polling stations. It is rather unbelievable how the petitioner fails to furnish in Exhibit 'A' at least the details furnished in this Petition. In a similar situation, this Court in recent judgement dated 16-11-1995 in Election Petition No. 2/95 in *Manohar Gopal Naik v. Subhash Ankush Shirodkar & ors.* held:

"...An order for inspection cannot be granted to support vague pleas not supported by material facts or without an evidence to such plea.

He has to place before the Court prima facie evidence for an order of inspection to become necessary in the interest of justice. A promise or hope contained in the petition in case he is given an opportunity of re-counting, he will be able to satisfy the Court there was wrong counting on account of improper reception; refusal or rejection of votes etc. were not at all sufficient to justify a case of re-counting. In order to succeed in the election petition, the allegations must be clear and precise in contradistinction with vagueness, surmises and hopes and aspirations. Pleadings in assertive terms alone will not satisfy the statutory requirement; they should also be definite. Pleadings should contain such details, which if not controverted, present prima facie case before the Court."

The facts of this case also prompt me to follow the self same observations made by this Court in that Judgement. The Petitioner's counsel's contention is that if a chance is given to his client for evidence he is sure that he will be able to establish the irregularity of counting. It is a well known position in Election law that such a plea will amount to a roving and fishing enquiry which cannot be permitted to be raised to have a relief of re-count.

29. Therefore, preliminary issues are found against the petitioner. The Election Petition is rejected on the grounds discussed above. The petitioner is liable to pay a cost of Rs. 2,000/- to the 1st respondent.

Sd/-

Assistant Registrar
High Court of Bombay
Panaji Bench (Goa).

Department of Personnel

Order

No. 6/16/74-PER (Vol. III)

Read:- Government Order No. 43-2-95-GA &C dated 26-9-95.

Sanction is hereby accorded for the grant of special pay of Rs. 250/- (Rupees Two hundred and fifty only) to the post of Joint

Secretary (Education) from the date of creation of the said post i. e. 26-9-95.

The expenditure is debitable to the same Budget Head against which the Officer holding this post is drawing his pay and allowances.

This issues with the concurrence of Finance Department vide their U.O.No. FS/1419/F dated 29-2-96.

By order and in the name of the Governor of Goa.

S. S. Keshkamat, Joint Secretary (Personnel).

Panaji, 21st March, 1996.

Order

No. 6-3-81-PER (Vol. VIII)/Part

Consequent upon issue of Notification No. 3-52-83-LAWD/Curchorem/Cacora-16 dated 19-2-1996, classifying the Panjim Municipal Council as 'A' Class Municipal Council, Shri A. A. Manerkar, Chief Officer, Panjim Municipal Council is transferred and posted as Deputy Director (Administration) in the Directorate of Agriculture, Panaji, in vacant post, with immediate effect.

Shri P. W. Rane Sardessai, a Senior Grade Officer of Goa Civil Service presently working as Administrative Officer/Recovery Officer in Goa, Daman & Diu Industrial Development Corporation, Panaji, is hereby transferred and posted as Chief Officer, Panjim Municipal Council, with immediate effect.

Shri P. W. Rane Sardessai shall move first.

The deployment of Shri Rane Sardessai will be on deputation which will be governed by standard terms of deputation as contained in this Department's Office Memorandum No. 13/4/74- PER dated 10-10-1990 and 27-10-1995.

The terms of deputation of Shri Manerkar and Shri Rane Sardessai is curtailed with effect from the date of their relief.

By order and in the name of the Governor of Goa.

S. S. Keshkamat, Joint Secretary (Personnel).

Panaji, 21st March, 1996.